

CGU Hawkeye-Security Insurance Company (CGU), as the purported carrier of J. T. Framing, LLC, (J. T. Framing) argues that the Judge erred by (1) finding that CGU was estopped from denying that it provided insurance coverage to J. T. Framing for the April

2000 accident, (2) assessing liability against J. T. Framing and CGU when claimant elected to proceed against Mike Welch Builder, Inc., and (3) finding that claimant was an employee of J. T. Framing instead of an independent contractor.

Conversely, Mike Welch Builder, Inc., (Mike Welch) and CGU contend the Judge erred by finding that Mike Welch was claimant's statutory employer.

The appellants request the Board to review the following issues:

1. Was claimant an employee of J. T. Framing?
2. Is this claim governed by the Workers Compensation Act?
3. Was CGU providing insurance coverage to J. T. Framing on the date of accident?
4. Did the Judge err by failing to assess liability against the Workers Compensation Fund?
5. Did the Judge err by failing to assess liability against Mike Welch?
6. Did the Judge err by applying the doctrines of estoppel and apparent authority in this claim?
7. Did the Judge err by assessing liability against J. T. Framing and CGU when claimant elected to proceed against Mike Welch and CGU?
8. Was Mike Welch claimant's statutory employer?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

1. The preliminary hearing Order should be affirmed.
2. Because this is an appeal from a preliminary hearing order, not every alleged error in law or in fact may be reviewed. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues, which are deemed jurisdictional:<sup>1</sup>
  - (i) Did the worker sustain an accidental injury?
  - (ii) Did the injury arise out of and in the course of employment?

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<sup>1</sup> K.S.A. 44-534a.

(iii) Did the worker provide both timely notice and timely written claim of the accidental injury?

(iv) Is there any defense that goes to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.<sup>2</sup>

3. Workers compensation judges have the authority and jurisdiction at preliminary hearings to award medical compensation and temporary total disability benefits against a respondent that is determined to be either an actual employer or statutory employer. The judge has the power and jurisdiction to decide that question rightly or wrongly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>3</sup>

4. The Board concludes that the only issues from the preliminary hearing Order that it may review from the eight listed above are (1) whether claimant was J. T. Framing's employee, (2) whether Mike Welch was claimant's statutory employer, and (3) whether the Workers Compensation Act governs this claim. The remaining five issues are not subject to review at this juncture of the proceeding as they neither address the compensability of the claim nor any of the other jurisdictional issues enumerated in K.S.A. 44-534a.

5. The Board agrees with and adopts the Judge's analyses and conclusions that on the date of accident claimant was an employee of J. T. Framing and, further, that Mike Welch was claimant's statutory employer. The Board adopts the Judge's findings for purposes of this order. Additionally, the Board finds that the changes that J. T. Framing made in paying claimant in March 2000 were merely part of an attempt to defeat claimant's child support obligation. J. T. Framing's attempt to "make" claimant self-employed was a sham. The overwhelming weight of the evidence establishes that on the date of accident claimant was an employee of J. T. Framing, who was a subcontractor for Mike Welch, a general contractor whose regular business was building homes.

6. The Board also concludes that this claim is governed by the Workers Compensation Act. In its application for Board review, CGU, as J. T. Framing's purported insurance carrier, raised the issue of whether the Workers Compensation Act governed the April

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<sup>2</sup> K.S.A. 44-551.

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

2000 accident. But the insurance carrier apparently has abandoned that issue as it was neither addressed nor argued in the insurance carrier's brief to the Board.<sup>4</sup>

**WHEREFORE**, the Board affirms the March 5, 2001 preliminary hearing Order entered by Judge Sample.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2001.

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BOARD MEMBER

c: Thomas R. Fields, Kansas City, KS  
Michael J. Haight, Overland Park, KS  
Ronald J. Laskowski, Topeka, KS  
Gary R. Terrill, Overland Park, KS  
J. Paul Maurin, III, Kansas City, KS  
Julie A. N. Sample, Administrative Law Judge  
Philip S. Harness, Director

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<sup>4</sup> A point incidentally raised but not argued is deemed abandoned. *McKissick v. Frye*, 255 Kan. 566, 578, 876 P.2d 1371 (1994).